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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 664

October Term, 1950.

FRED MONEY,

Petitioner,

v.

CAPTAIN H. N. WALLIN, COMMANDER EDWIN H. SCHANTZ, CHARLES D. HERTZOG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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FRED MONEY, petitioner, prays that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 10, 1951.

OPINIONS BELOW.

The opinions of the United States District Court for the Eastern District of Pennsylvania are reported in 88 F. Sup. 980 and 89 F. Sup. 932. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 186 F. 2d 411.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 10, 1951. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1251 (1).

QUESTION PRESENTED.

May a regulation by the executive branch of government deprive some classes of civil servants of an available judicial review for an infringement of their civil service statutory rights?

STATUTES INVOLVED.

The Civil Service Act of 1912, 37 Stat. 555, (5 U.S.C.A. 652), grants civil servants permanent tenure, save for cause, and grants civil servants the unqualified right to be furnished a copy of preferred charges for cause with reasonable opportunity to submit an answer accompanied by supporting affidavits.

STATEMENT OF THE CASE.

Petitioner was regularly employed in the Philadelphia Naval Base as a classified civil servant of the United States (19a). His civil service classification was master mechanic (20a).

On February 1st, 1944, the Commandant of the Philadelphia Naval Base preferred written charges against petitioner and forbade him from re-entering the Base (42a). On February 5th, 1944, the Commandant sent a memorandum to the Secretary of Navy recommending petitioner "be discharged" (44a).

That memorandum based the recommendation on the charges which alleged petitioner "in or near National Park, New Jersey," * * * (petitioner's town of residence) * * * "over a period of years * * * had abnormal sexual relations with * * * girls in their teens. * * *"(43a). The Commandant's memorandum made no attempt to clarify that vague charge (43a-44a).

On April 28, 1944, petitioner received a communication from the office of the Secretary of the Navy (29a, 46a). That communication dated April 18, 1944, announced petitioner's "removal" (46a).

Upon receipt of the Commandant's charges and continuing thereafter, petitioner sought a clarification of the charges so that he might submit an answer accompanied by affidavits (68a-70a). Petitioner simultaneously sought additional time in which to prepare such an answer and to obtain accompanying affidavits (71a). Petitioner was granted neither clarification nor time (71a).

Petitioner, nevertheless, persisted in his belief that the indefiniteness of the Commandant's charge, coupled with the brief reply period, effectively deprived him of his statutory right to submit an answer accompanied by affidavits.

Petitioner therefore continued to seek relief by an exhaustion of his administrative rights to review (29a). Petitioner thereafter commenced a civil action in the District Court for the Eastern District of Pennsylvania to obtain judicial relief from the infringement of his statutory civil service rights (4a).

The civil action does not seek a judicial review of the truth of the charges.

The civil action seeks a judicial determination that the Commandant's actions deprived petitioner of his statutory right to submit an answer accompanied by affidavits and that such deprivation was in violation of the explicit provisions of the Civil Service Act (supra). (4a-11a.)

The Complaint named the Commandant as a defendant (4a). He was duly served (19a). The Secretary of the Navy was not named as a defendant or thereafter joined as a defendant.

The District Court dismissed petitioner's action (85a-89a). The Court of Appeals affirmed, on the single ground that the Secretary of Navy was an indispensable party and therefore the Local District lacked jurisdiction (93-95).

The Court of Appeals, in so affirming, relied upon a regulation promulgated by the Secretary of Navy for governing the employment of civilian personnel in the field service of the Navy Department (94). That regulation specified the Secretary of Navy to be the person to take final

action for termination of the employment of employer of petitioner's civil service grade classification (47a).

There is no evidence that the Secretary of Navy directed petitioner's work or that the Secretary of Navy had any personal knowledge of petitioner, or his work, or his conduct. The only evidence as to the Secretary of Navy's knowledge of the petitioner, is the issuance of the order of "removal" and the prior transmission of the Commandant's recommendation of removal.

The Court of Appeals' opinion, however, stated that this regulation constituted the Secretary of Navy an indispensable party to petitioner's civil action (94). It reasoned that success of petitioner's civil action would challenge and conflict with the Secretary of Navy's order of "removal" hence conflict with the Navy regulation in question (95).

The judgment of the Court of Appeals thus prohibits petitioner, and all of his classification grade, from judicial relief in any court save that of the District of Columbia. Civil servants in lower grade classification are not so deprived of the opportunity to seek judicial relief in their available local Federal court.

Petitioner, however, continues his belief that his statutory rights are secure from impairment by or amputation by an administrative order. Petitioner further continues his belief that deprivation of the opportunity to seek relief in an available court is an impairment or amputation of his civil service statutory rights. For like reasons it effects an impairment or amputation of the civil service statutory rights of all other in petitioner's grade classification.

Hence petitioner files this petition.

REASONS FOR GRANTING THE WRIT.

Despite the content of the Court of Appeals' opinion the question herein raised is not the concept of the indispensable party. This Court has clarified that concept: *Williams v. Fanning,* 332 U. S. 490 (1947).

This petition questions the right of the executive branch of the government to deprive certain classes of civil servants of an otherwise available judicial remedy for relief against an infringement of a statutory right. The deprivation effectively does or may bar all opportunity for judicial relief.

Petitioner sought and was denied the right to relief in his available local court. Petitioner believes he may not be so deprived by a mere executive regulation. He was so deprived by the Secretary of the Navy's regulation.

To petitioner's subordinates is available the right to seek judicial remedy in their local Federal Court.

The Secretary of Navy's regulation permits the Commandant or others to themselves terminate the employment of civil servants in grade classifications lower than petitioners'. Hence, local Federal Courts are not deprived of jurisdiction for actions which they may bring for an infringement of their civil service statutory rights.

It has been determined by this Court that the Government, whether acting through the legislative, executive, or judicial branch, may not take away a full and adequate remedy for an infringement of a constitutional right. See *Binkerhoff-Faris Trust and Saving Company v. Hill,* 281 U. S. 673 (1930); *Truax v. Corrigan,* 257 U. S. 312 (1921). To hold the contrary, conflicts with the basic tenet of constitutional law that a constitutional right may not be destroyed by a legislative enactment.

No judicial determination by this Court prohibits an administrative order from taking away a full and adequate available remedy for an infringement of a statutory right. The judgments of the Lower Courts sanction an order of

the executive branch to nullify the enactment of the legislative branch.

Petitioner seeks this Court to determine that the executive branch may not so nullify and take away a right granted by the legislative branch.

The principle involved is not limited to the infringement of the statutory rights resulting from the Civil Service Act. The principle is equally applicable to other federal and state statutory rights.

The Lower Courts failed to recognize this principle. Their judgments and opinions are concerned with the concept and application of the indispensable party doctrine. Their judgments, however, sanction and effect an infringement of a statutory right.

The extent of the infringement is focused, if it be assumed petitioner was a resident of Guam, and there employed in a Naval Base. The Lower Courts' judgments, upon such facts, would deprive petitioner of all judicial remedy for relief save by journeying to and bringing his witness to the District Court for the District of Columbia. Civil servants likewise employed, but not encompassed by the Secretary of Navy's regulation, could obtain identical opportunity for review in the most proximate Federal Court.

The Department of Navy's regulation may give those in petitioner's classification an administrative right against termination of employment, save upon approval by the Secretary of Navy. Such administrative right is, in some respects, greater than petitioner's statutory rights to be informed of, and an opportunity to submit an answer to charges preferred.

It does not follow that the granting of such administrative right deprives petitioner of his statutory rights. Similarly it does not follow that the granting of the administrative right precludes him from available judicial remedy for relief against infringement of his statutory rights.

Petitioner's possible greater administrative rights were determined by the Commandant's letter recommending the Secretary of Navy to terminate petitioner's employment. That letter afforded petitioner no opportunity to answer the charges. The regulation causing that letter does not and should not deprive petitioner of an opportunity to seek relief in his available local court.

CONCLUSION.

For the foregoing reasons, this petition for the writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 664

FRED MONEY, PETITIONER

v.

CAPTAIN H. N. WALLIN, COMMANDER EDWIN H. SCHANTZ, CHARLES D. HERTZOG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 82-85 and R. 88-89) are reported at 88 F. Supp. 980 and 89 F. Supp. 932. The opinion of the United States Court of Appeals for the Third Circuit (R. 91-95) is reported at 186 F. 2d 411.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1951 (R. 96). The petition

for a writ of certiorari was filed on April 9, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in view of a Civil Service regulation which provided that the Secretary of the Navy was alone authorized to remove an employee in petitioner's employment category, the Secretary of the Navy is an indispensable party to this action for reinstatement by petitioner, a civil service employee dismissed by the Secretary from the Philadelphia Navy Yard.

2. Whether petitioner was discharged in accordance with the procedural requirements of Section 6 of the Civil Service Act of 1912, 5 U. S. C. 652.

STATUTE AND REGULATIONS INVOLVED

Section 6 of the Civil Service Act of 1912, 5 U. S. C. 652, provides in pertinent part:

> no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in

> the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same * * *.

Paragraph 90 (a) of the Civil Service Commission Form 2009, adopted by the Navy Department and the Civil Service Commission in February, 1933, provides (R. 47):

> The officer making such removal or reduction of employees under Group I, II, or III, or of leaders, leadingmen, or quartermen, or head laborers or mechanics at naval hospitals is the commanding officer. Recommendation for removal or reduction of all employees in Group IV, except leaders, chief and assistant chief mechanics, leadingmen, quartermen, head mechanics, and head laborers at naval hospitals shall be forwarded to the Secretary of the Navy for action, accompanied by copy of the charges preferred against the employee and his reply thereto.

STATEMENT

On January 25, 1944, petitioner was employed at the Philadelphia Navy Yard as a "Master Mechanic, Forge Shop," with a Civil Service classifi-

cation of Group IVa (R. 82). By confidential letter of that date (R. 38), the commandant of the Navy Yard notified petitioner that he proposed to take disciplinary action against him on charges which were to be preferred verbally because of their nature, and petitioner was directed to appear at the commandant's office upon receipt of the letter. Petitioner did so, and was verbally charged with improper relations with women (R. 67-68).

Written charges (R. 42) were preferred against petitioner on February 1, 1944 (R. 44). Petitioner was charged with making improper advances to two women employees at a shop party in March, 1943, and with having abnormal sexual relations over a period of years with teen-age girls who lived in the vicinity of his home. He was suspended pending action in the case, and was given three days within which to make written reply to the charges (R. 42). Petitioner answered by letter (R. 57-59), together with accompanying affidavits (R. 60-64), within the prescribed period, and on February 5, 1944, the commandant, by letter of that date (R. 43-44), recommended to the Secretary of the Navy that petitioner be discharged. On April 18, 1944, the Secretary of the Navy, by letter signed by the Assistant Secretary of the Navy (R. 46-47), discharged petitioner "to promote the efficiency of the service."

Following his discharge, petitioner attempted to obtain from the Civil Service Commission a review of his case and reinstatement in his position (R.

29). He was unsuccessful in this attempt, the Director of the Third United States Civil Service Region being of the opinion (R. 30) that petitioner was discharged in accordance with the applicable rules and regulations. Petitioner then instituted this action (R. 4-11) against the commandant of the Navy Yard, the chief personnel officer of the Navy Yard, and the Director of the Third Civil Service Region. The complaint, based upon Section 6 of the Civil Service Act of 1912, *supra*, pp. 2-3, did not seek a judicial review of the reasons for the dismissal, but alleged a violation of statutory rights in that petitioner was not given a sufficient statement of the charges against him, nor a reasonable time in which to answer the charges (R. 8, 9). By way of relief, petitioner prayed for an order declaring the discharge invalid and directing the respondents to reinstate petitioner, to furnish him with the complete record relating to the suspension and discharge, to review the charges against him and, after affording a reasonable time for the preparation of a defense, to consider whether the charges, in the light of the defense "substantiate cause for discharge" (R. 11).

Respondents moved to dismiss the action for lack of necessary parties, for failure to state a cause of action, and for lack of jurisdiction of the subject matter (R. 13-15). These motions were denied (R. 19). The case then went to trial and the district court dismissed the complaint (R. 85) holding, *inter*

alia, that petitioner had been discharged in accordance with the procedural requirements of Section 6 of the Civil Service Act (R. 83-84). On petitioner's motion for a new trial, the district court reaffirmed its action and held that the complaint should be dismissed for the further reason that the Secretary of the Navy, who was not, and could not be served in the Eastern District of Pennsylvania, was an indispensable party to the proceedings (R. 88-89). The Court of Appeals affirmed the dismissal on the ground that the Secretary of the Navy was an indispensable party to the proceedings under the rule of *Williams* v. *Fanning,* 332 U. S. 490 (R. 91-95). It considered the indispensable party issue dispositive of the case, and thus did not pass upon the other reasons advanced by the district court for its action in dismissing the complaint (R. 93).

ARGUMENT

1. The rule as to the dispensability or indispensability of superior officers was recently set forth by this Court in *Williams* v. *Fanning,* 332 U. S. 490. In the *Williams* case, at p. 493, the superior was declared to be an indispensable party "if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by maving a subordinate exercise it for him." If the superior is to be held not an indispensable party, the decree to be entered should "ef-

fectively grant the relief desired by expending itself on the subordinate official who is before the court." Id., at 494. We think it clear that, in declaring the Secretary of the Navy to be an indispensable party to the present action, both courts below complied with this rule.

The rules and regulations of the Civil Service Commission in force at the time of the dismissal of petitioner and which cover employees in petitioner's Civil Service rating provide (*supra,* p. 3) that "recommendation for removal or reduction of all employees in Group IV * * * shall be forwarded to the Secretary of the Navy for action, accompanied by copy of the charges preferred against the employee and his reply thereto." The language of this regulation makes it clear that it is the Secretary of the Navy who was alone authorized to take final employment action with respect to employees in petitioner's category.[1] If petitioner is to secure the relief prayed for, the Secretary must order his reinstatement, either directly or through some subordinate. The present commandant of the Philadelphia Navy Yard—the only subordinate official before the district court who could conceivably do so—has no power to reinstate petitioner, even if (as petitioner claims) he was not separated according to the statutory requirements. Once the

[1] Petitioner's promotion in May, 1938 to the position of "Master Mechanic, Forge Shop," Group IV (a), as well as his final discharge, was accomplished by action of the Secretary of the Navy (R. 36).

Secretary of the Navy has removed an employee, the commandant would not be authorized to reinstate him, without the Secretary's approval or concurrence. See *Daggs & Braito* v. *Klein*, 169 F. 2d 174 (C.A. 9), certiorari denied, 335 U. S. 908; cf. *Gnerich* v. *Rutter*, 265 U. S. 388; *Jacobs* v. *Office of Housing Expediter*, 176 F. 2d 338 (C.A. 7).

The Secretary's indispensability is made plain by the nature of the case petitioner makes. The gravamen of the complaint is that petitioner was not furnished with a sufficient statement of the charges against him, nor given a reasonable time in which to answer the charges, contrary to his statutory rights as a Civil Service employee (R. 9). The conclusion is then drawn that, because of this alleged administrative failure, petitioner is entitled to an order directing the respondents to reinstate him and reconsider the charges against him (R. 11). But assuming that to be true, the only official who could lawfully order petitioner's reinstatement would be the Secretary of the Navy who initially removed him and who alone has the authority to reinstate him. A decree directing the relief desired by petitioner would, therefore, not expend itself on the Navy Yard commandant who is before the court, but would require action by the Secretary who is not, and cannot be made, a party. Cf. 332 U. S. at 494.[2]

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[2] Petitioner does not contend that the commandant was authorized to take final action in the reinstatement proceed-

2. Although the court below did not reach this aspect of the case, the record makes it clear that petitioner has made no showing on the merits, and the district court so held (R. 84-85). In his complaint (R. 8, 9), petitioner alleged a violation of Section 6 of the Civil Service Act of 1912, *supra*, pp. 2-3, principally in that he was discharged without being given a sufficient statement of the charges against him. The record shows, however, that on January 25, 1944, oral charges of improper relations with women were made against petitioner by the commandant of the Yard (R. 67-68). On February 1, 1944, written charges (R. 42, 44) were preferred against petitioner, pursuant to the Act. Petitioner was charged with making improper advances to two women employees at a shop party in

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ings. The only argument advanced by petitioner to this Court is that the Navy Department, by its administrative regulation, supra, p. 3, denied petitioner "the right to relief in his available local court. Petitioner believes he may not be so deprived by a mere executive regulation" (Pet. 5). The answer to this contention is that petitioner has no vested or constitutional "right" to sue the head of an executive department of the United States in the local federal court. Moreover, the Navy regulation did not deprive the local federal court of venue, nor was that its object. Petitioner must sue the Secretary of the Navy in the District Court for the District of Columbia, his official residence, by virtue of the general venue provision of the Judicial Code (28 U. S. C. § 1391 (b)), which directs that an action in a federal court which is not based solely upon diversity of citizenship may not be brought against any defendant in a district of which he is not an inhabitant, unless otherwise provided by law. Admittedly, the action here is not based upon diversity of citizenship, nor has Congress passed any statute permitting a suit of this sort against the Secretary of the Navy in a federal court other than that for the District of Columbia.

March, 1943, and with having abnormal sexual relations with teen-age girls who lived in his neighborhood. We submit that these accusations were sufficiently specific to apprise petitioner of the charges against him. Indeed, the letters and affidavits which petitioner submitted in rebuttal (R. 57-64) reveal that he was fully aware of the matters involved.

We think it clear, therefore, that the district court's finding that the petitioner was discharged in compliance with the procedural requirements of Section 6 of the Civil Service Act was correct. This conclusion is further substantiated by the finding (R. 30) of the Civil Service Commission's Regional Director, Third Civil Service Region, that the statutory requirements were met.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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